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United States

OCTOBER TERM, 1968

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No. 33

WALTER E. WASHINGTON, et al.,
Appellants,

vs.

MINNIE HARRELL, et al.,
Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF THE NATIONAL FEDERATION OF THE BLIND AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE NATIONAL FEDERATION OF THE BLIND AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE NATIONAL FEDERATION OF THE BLIND

The National Federation of the Blind, as its name indicates, is a country-wide organization whose members (with relatively few exceptions) are legally blind persons, as are its officers and leaders. The membership totals many thousands, a large number of whom are recipients of public assistance in various states.

Since its inception, and in pursuit of the goals leading to its creation, N.F.B. has dedicated much voluntary time and effort, and all the money it could muster, to gain for the blind a full and equal footing in society and to end the negative attitudes and practices which have kept so many of them locked in poverty and dependence over the centuries. In these efforts, although by no means of exclusive concern, the reform of welfare legislation in respects important to the blind as well as others has ranked high. We believe N.F.B. is entitled to share in the credit for a number of forward steps in that field. The organization was fortunate to have as its founder and its president over many years Professor Jacobus tenBroek, whose accomplishments included the chairmanship of the State Social Welfare Board of California and whose work and writings in the social welfare and legal fields earned him wide and just acclaim. His untimely death a few weeks ago marks a sad loss not only for N.F.B. and the blind but for the whole country, particularly the unfortunate and the poor.

N.F.B. has long been an opponent of durational residence requirements in welfare legislation, convinced that they are both unwise and unconstitutional. Dr. tenBroek was one of their leading critics in his writing. (See, e.g., tenBroek and Matson, *The Disabled and the Law of Welfare,* 54 Cal. L. Rev. 809, 824-828 (1966).)

Because of N.F.B.'s long-standing interest in the problem before the Court, we requested consent to file an amicus curiae brief in support of appellees in

this case, and the consent was graciously given by both sides. Our observations and arguments will not be limited to the concerns of the blind alone but of recipients of assistance generally, and, naturally, the Pennsylvania and Connecticut cases now pending before the Court on the same subject are of no less interest to us than the present one. We hope that this brief will contribute to the final condemnation of provisions which have marred and frustrated our social welfare system for far too long.

ARGUMENT

I. BOTH THE EFFECT AND THE PURPOSE OF CHALLENGED LEGISLATION MUST BE CONSIDERED IN ASSESSING ITS CONSTITUTIONALITY.

At the risk of rehearsing the rudimentary, we think it particularly appropriate in this field to stress at the outset that the constitutional infirmity of legislation may arise from its effect or its purpose or both. There is a danger of losing sight of this elementary but important point in deference to the more provocative inquiry as to the character of underlying purposes where, as here, so much attention is paid by supporters of legislation to its asserted justifications and by its opponents to the invalidity of those goals.

Frequently, of course, the unsound character of a statutory objective is self-evident and can, without the hunt for legislative motives in which courts hesitate to engage, provide the basis for judicial condemnation. (E.g., *Truax v. Raich*, 239 U.S. 33, 40-41

(1915).) We are convinced that such is the case presented here and by all durational residence requirements in welfare legislation and that this case and the related ones now before the Court may be disposed of on that ground. Nevertheless it is apposite to keep in mind that the effect of a statute, whether or not intended, may be to abridge constitutional rights and will require invalidation where no legitimate governmental interest is promoted by the measure or where such an interest is advanced but is of insufficient strength to warrant the abridgement or can be accomplished by less drastic means without infringement of the Constitution. Although the strength of the governmental interest which must appear, as well perhaps, as the care required in tailoring legislation to serve it, may vary depending upon the importance of the particular right involved, there is potential in every constitutional attack the question of effect independent of purpose.

The point is well illustrated by *Sherbert v. Verner*, 374 U.S. 398 (1962). In condemning the statute there involved, this Court did not hold that the abridgement of the freedom of religion was intended. To the contrary, in approaching the problem, it took care to emphasize that the statute must fall if its purpose "or effect" was the curtailment and there was no compelling governmental justification. (374 U.S. at p. 404.)

It is with the foregoing in mind that we, although satisfied of the nature and invalidity of the legislative intent here, address ourselves in some detail to the

effect of durational residence requirements in welfare legislation.

II. THE EFFECT OF DURATIONAL RESIDENCE REQUIREMENTS IN WELFARE LEGISLATION IS TO IMPOSE A SERIOUS RESTRAINT ON MOVEMENT BY THE POOR AND A DISCRIMINATORY AND DRASTIC PENALTY UPON PERSONS WHO MOVE

The discriminatory effect in regard to a vital concern is plain from the face of every durational residence requirement in welfare legislation. All unable to meet the requirement, although otherwise eligible under the prevailing standards, are denied public assistance; all identically situated except for the duration of residence are granted the assistance. At stake on the basis of this sole difference is nothing less than the means to subsist, to acquire food, shelter, and other necessities of life. The dire consequence is such as to be anticipated in some instances and always to be suffered, whether or not anticipated, and the requirement thus operates both as a serious restraint on poor persons wishing to move into a jurisdiction and as a drastic penalty upon persons who have recently moved there and are in need.

A full assessment of the durational residence requirement calls for some precision of statement which neither champions nor detractors have always been ready to acknowledge. Not infrequently in the polemics in this field, therefore, one confronts hasty generalizations and internal inconsistencies. Thus, for example, those seeking to justify the requirements

speak of the influx of recipients to be expected in the absence of such restrictions and yet disclaim that the requirements impede movement and disregard that, in any event, those who have recently come into a jurisdiction and need assistance are penalized for having moved. On the other hand, opponents of the legislation have sometimes concentrated on the deterrent and punitive impact which cannot reasonably be denied, while tending to belittle the possibility of an increased influx of the poor in some instances and to leave unmentioned the fact that, notwithstanding the restrictions, some persons needing or likely to need assistance appear to change their state of residence and may, with luck, suffer no hardship.

The truth seems to us clear. Although there are specialized data and opinions pointing to it, we know of no scientific study conclusively establishing it and doubt that, in the nature of the problem, there will ever be such a study. As is common in regard to the effect of enactments generally, assessment by courts is not controlled by expert evidence or opinions contained in the particular record or judicially noticeable but depends, in the final analysis, upon a consideration of the tendencies and consequences judicially attributable to a measure in the light of its terms and their natural or reasonably expectable impact on those subjected to their operation.[1] So approached, and

[1] This Court, for example, did not depend on any special demonstration in discerning the restraint in *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1939), or the penalty in *Sherbert v. Verner*, 374 U.S. 398, 405-406 (1962).

with the guidance and decisions assessing other statutes, the legislation now before the Court, although it may not be uniform or absolute in its operation, must be viewed as effecting both a restraint and penalty upon movement of constitutionally significant dimensions.

A. The Restraint Upon Movement by the Poor Is Demonstrated by Common Sense and by Judicial Assessment of Other Provisions

It is submitted beyond reasonable controversy that durational residence requirements in welfare legislation operate as a prior restraint upon thousands of poor Americans wishing to move from one jurisdiction to another. This fact seems inescapable when common sense is brought to bear on the prevalence of such requirements throughout the country, the extremity of their length, and the gravity of the denial of aid to those in need of it. Moreover, recognition of that fact is called for by decisions which concern other provisions affecting movement.

(1) Common Sense

The common sense approach must begin with recognition of the prevalence and severity of the durational residence requirements. According to recent compilations, only about one-fifth of all the states have eliminated such requirements as to one or more categories of aid. The remainder retain, as to all forms of aid, restrictions ranging from six months to five years. (See Morton, *1967 Public Welfare Directory*, p. 208, Table 1.)

For true perspective, the foregoing must be coupled with the vastness of the population dependent on assistance. It has lately been reported that the average total of persons receiving federally supported aid (that is, without inclusion of recipients of general assistance provided by states and localities alone) is 7.5 million per month. (See *Report of the National Advisory Commission on Civil Disorders* (Bantam Books ed. 1968) p. 457.)

Out of these millions of recipients, it is to be expected that there are a number who may be unaware of the existence of durational residence requirements or who, though having such knowledge, undertake to move elsewhere because of high assurances of employment or interim economic help or other compelling considerations, such as health, or because they are just plain reckless. Such persons, as well as those whose need arises after moving but before satisfaction of the requirements, would be affected by the bite of the statute but not its restraining arm.

On the other hand, it requires no expertise to recognize that the millions of recipients must include many who, for a variety of reasons, would wish to move but realize their need for continued assistance and their ineligibility to receive it for months or even years if they go to any but a handful of jurisdictions. Their choice is to remain where they are or invite disaster. Quite naturally, those faced with that choice must in large numbers elect the former course. To say less is to regard recipients of assistance as

a breed apart, devoid of average intelligence and normal reluctance to embrace hardship.

(2) Decisions Assessing Other Provisions

The constitutional dimensions of the restraint thus exerted on movement by the poor seem clear from prior decisions of this Court.

Preliminary note should be taken in this connection of First Amendment decisions establishing that prior restraints flowing from enactments are to be considered in determining their validity even though they are not absolute or uniformly effective and come before the Court in the person of one who disregarded the restraint and suffered the penalty. (E.g., *Staub v. City of Baxley,* 355 U.S. 313, 320-322 (1958); *Kunz v. New York,* 340 U.S. 290, 293 (1951); *Thornhill v. Alabama,* 310 U.S. 88, 97-98 (1939).) As will be discussed later in more detail, the freedom of movement is a right akin in importance to First Amendment freedoms, and the doctrine of the cited cases should for that reason alone be applied wherever restraint on movement is involved. However, this does not find its force solely in analogy. In *Edwards v. California,* 314 U.S. 160 (1941), the statute was condemned for its burdensome effect on movement even though the one subjected to its penalty had not been restrained by it but had already transported the indigent into the state.

More important, perhaps, than the rather self-evident proposition that a restraint need not be absolute

or invariably effective in order to achieve constitutional dimensions is a comparison of the restraint at hand with a few examples of impediments heretofore accorded such significance by this Court. The prospect of losing the means of subsistence for months or years cannot reasonably be deemed less threatening than the tax differential of approximately $2,500.00 for commercial fishermen described as "practically exclusionary" in *Toomer v. Witsell,* 334 U.S. 385, 396-397 (1947). Certainly, the exclusionary effect of the threat involved here must be much greater than the $45.00 tax differential for fishermen which, under the authority of *Toomer,* was condemned in *Mullaney v. Anderson,* 342 U.S. 415 (1951). Nor, even with the notoriously steady decline of the dollar can the small tax in *Crandall v. Nevada,* 73 U.S. 35 (1897), be thought remotely comparable in severity and consequent impediment.

In short, considering the reasonably expectable, if not inevitable, impact of durational residence requirements in welfare legislation and guided by judicial precedents, we are convinced that the requirements operate as a prior restraint upon movement by substantial numbers of poor persons. We can admittedly point to no scientific study conclusively supporting us, but the nature of the problem does not feasibly lend itself to such an approach. One seeking demonstration satisfying the standards of the laboratory will search in vain among the existing materials. From our experience, he will find a few studies of narrow scope and questionable control, reliance on

facts which bear at best obliquely on the subject and often point in opposite directions, and considerable divergence of opinion among those who might be regarded as experts in the field. Here, as elsewhere, the only ultimate criteria suitable for the Court are the ones we have followed. Their result, we respectfully submit, is the soundness of our position.

B. The Discriminatory Penalty Against Poor Persons Who Move Is Obvious

Durational residence requirements in welfare legislation, in addition to their forceful operation as a restraint on movement by the poor, have the other and discriminatory effect of denying assistance to poor persons who are in need but have not lived in the jurisdiction long enough. That this drastic denial resulting solely from recent movement can properly be designated a penalty seems obvious. It imposes no less a hardship than the denial of unemployment insurance recognized as a penalty in *Sherbert v. Verner,* 374 U.S. 398, 405-406 (1962), and a far greater hardship than the loss of the tax exemption characterized as a penalty in *Speiser v. Randall,* 357 U.S. 513, 518 et seq. (1957).

Full appraisal of the extremity of the discrimination, however, necessitates examination of the requirements from two viewpoints. The typical requirement sweeps within its harsh ambit all who, although sharing the overriding trait of need for assistance and being alike in their disqualifying status of newcomers, may be dissimilar in a number of respects. This wholesale lumping is accompanied by a comparable

one in the other direction. The means of subsistence denied to newcomers are granted to those having sufficient length of residence even though they may be in less need or may possess, unlike some newcomers, traits which are sometimes relied on as negativing worthiness for solicitude and, indeed, as justifying a discouragement of entry by poor newcomers.

Thus, on the one hand, typically relegated to the same condition of unrelieved penury is the newcomer who, having a consistent history of gainful employment prior to his move, has for the first time encountered the need for public assistance and the newcomer who has always been dependent on such assistance; the newcomer who moved with subsequently unfulfilled expectations of employment or private help and the one who moved with every intention of applying for public assistance as soon as possible; the newcomer who is employable and may soon become employed and the one who is not and may never be; the newcomer for whom the existence and amount of public assistance played little or no part and the one by whom that matter was considered to be important; the newcomer, similarly, for whom the amount of public assistance available in the state of new residence would be lower than in his former abode and could constitute no attraction and the one for whom an increase would result; the newcomer whose move was his own decision and the one who, such as a child, moved with others making the choice; and the newcomer who moved with the intention of becoming and remaining a resident of the state and the one who enters the state as a sojourner only, without intend-

ing to make his home there or abandoning his former residence.[2]

The denial of assistance to such an all-inclusive class is incongruous in itself but can be fully measured in its discriminatory effect only when considered in contrast to the all-inclusiveness of the preferment. The classification based on the sole difference of duration of residence means, for example, that assistance may be denied to one who has no other source of economic help whatever and whose need is absolute, but granted to one whose need is relatively less because friends or others may be willing to aid him; denied to one who, as a taxpaying employee elsewhere, has contributed to the federal funds largely supporting the kind of assistance applied for, but granted to one who has never paid taxes anywhere;

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[2]Unlike what is true of the typical legislation under review, the statutory provisions of Connecticut involved in one of the related cases now before the Court make some distinctions among newcomers, both as to the kind of assistance sought and the length of residence required depending on variables at the time of entry with regard to prospects for employment and cash on hand. Connecticut is not alone in all such differentiations; California, for example, has eliminated durational residence requirements as to aid to the blind but not as to other forms of assistance. (California Welfare and Institutions Code, secs. 11252, 12050, 12550, 13550, 17104.) In the sense that the Connecticut approach results in treating some newcomers the same as established inhabitants, it is less vulnerable to attack for discrimination than the typical legislation, but it may be more vulnerable in the sense that it results in discriminatory classifications among newcomers. We have not undertaken in this brief to discuss the latter phase of the subject. However, irrespective of the variations in the Connecticut law, the observations and arguments made in this brief as to the more common legislation are applicable to that law, or any other law, to the extent that assistance is denied to a class or classes of newcomers by a durational residence requirement of any substantial length, whether the period be a year or more or, as is partially the case in Connecticut, three months.

denied to one who, having never required public assistance before and expecting employment, moved without thought or concern about the existence or amount of such assistance to be available in his new home, but granted to one who was receiving public assistance elsewhere and was induced to move by the availability of more generous amounts, expecting and receiving interim help until he could comply with the durational residence requirement; and denied to one who is employable and anxious to become self-supporting, but granted to one who is unemployable or lacks the positive motivation to cease his dependency.

We do not mean to suggest that any or a combination of the variables discussed above has any legitimate role in welfare legislation or should be determinative of validity if taken into account in the formulation of a durational residence requirement. To the contrary, we are convinced that, if a newcomer has moved into a jurisdiction with the intention of residing there and is otherwise eligible for assistance under the standards applicable to others, a durational residence requirement cannot be used to deny him, without regard to such variables. Our objective in the foregoing discussion has been merely to illustrate the utter lack of selectivity in penalizing those needy persons who have recently moved, a point which, as will be indicated in more detail later, is particularly important in view of some of the purposes and arguments defenders of durational residence requirements advance in vainly seeking to justify them.

III. DURATIONAL RESIDENCE REQUIREMENTS IN WELFARE LEGISLATION, BOTH IN PURPOSE AND EFFECT, VIOLATE CONSTITUTIONAL GUARANTEES OF THE FREEDOM OF MOVEMENT AND EQUAL PROTECTION AND DUE PROCESS OF LAW

It is respectfully submitted that durational residence requirements in welfare legislation are violative of more than one right guaranteed by the federal Constitution, and for much the same reasons. The crux of the multiple infringements is that, in a respect whose peer for harshness would be difficult, if not impossible, to find in the non-criminal sphere, persons living outside a jurisdiction or recently moving into it are arbitrarily discriminated against. We believe that the discrimination and its consequent restraint and penalty upon movement must be said in general to coincide with legislative intent, but, as noted earlier, that premise is not essential for invalidity. The effect discussed above, both restraining and penalizing, is there, whether or not intended, and the governmental interests advanced or imaginable in asserted justification of such a statutory scheme are ones which, at worst, are impermissible or lack compelling or rational force and which, at best, may be implemented by narrower and less drastic means. The result is a violation of the freedom of movement, which understandably occupies a preferred position under the Constitution and is specially safeguarded by principles judicially developed. Also, of course, provisions open to such criticisms must contravene the Equal Protection and Due Process Clauses of the Constitution, whether the operation of those clauses be regarded in

this context as inextricably entwined with the freedom of movement or as having an independent impact by reason of the invidious discrimination involved.

A. The Freedom of Movement Occupies a Preferred Position Under the Constitution and Is Safeguarded by Special Principles

The existence of the freedom of movement is now, of course, settled. We offer no observation on that phase of the problem other than to suggest that the divergence in emphasis which, as this Court has recognized *(United States v. Guest,* 383 U.S. 745, 759 (1965)), has been experienced in search for the primary textual source in the Constitution arises simply from the fact that, although the right is not specifically mentioned in any provision, it is encompassed and fortified by several, not unlike the case of the right of privacy. What is more important than the precise source or sources of the freedom is its preferment and the special rules applicable in reviewing attempts to abridge its exercise.

The former judicial hesitancy to name the freedom of movement and elevate it to its proper place under the Constitution came unmistakably to an end with the recent decisions involving both interstate and international travel and reviewing earlier cases and other authorities. None can now doubt that the freedom of movement is "fundamental to the concept of our Federal Union" and "basic in our scheme of values." *(United States v. Guest,* 383 U.S. 745, 757 (1965); *Aptheker v. Secretary of State,* 378 U.S.

500, 506 (1963); *Kent v. Dulles*, 357 U.S. 116, 126 (1957).)

Because this freedom has thus an importance akin to that of First Amendment rights, the reasonable conclusion would be, even in the absence of authority, that legislation abridging it should be judicially scrutinized under the same strict standards of review as are familiarly applied in First Amendment cases. Authority, however, is not lacking; such was the express holding of this Court in *Aptheker v. Secretary of State*, 378 U.S. 500, 508 et seq. (1963).

Some, including appellants, have fallaciously asserted, in effect, that the Court did not actually mean what it said in *Aptheker* and that this is demonstrable by the subsequent decision in *Zemel v. Rusk*, 381 U.S. 1 (1964). The argument runs that the strict standards of review are appropriate to safeguard the freedom of movement only where, as in *Aptheker*, First Amendment freedoms are connected with it. Nothing in *Aptheker* warrants such a construction. To the contrary, the Court did not base its condemnation on the First Amendment but on the Fifth and did not resort to the strict standards of review because a violation of the First Amendment itself was potential under the particular facts but because the right of movement in its own "basic" importance was "closely related" to the First Amendment freedoms. (378 U.S. at pp. 514-517.) We cannot fairly read *Zemel* as undermining *Aptheker*. To be sure, a different result was reached, but this is explainable by the difference in facts, and nowhere did the majority reason that

the strict standards of review were not applicable or could not be satisfied. The observation (381 U.S. at p. 16) that the appellant's claim was unlike the claim in *Aptheker* was merely set forth in the course of rejecting the contention that the First Amendment itself had been violated. To conclude from this that *Zemel* limited *Aptheker*, intending to initiate the notion that movement unlinked with First Amendment rights is not a freedom of the basic kind calling for special safeguards, is to ignore the Court's subsequent declaration that the freedom of movement is "fundamental to the concept of our Federal Union." *(United States v. Guest*, 383 U.S. 745, 757 (1965).)

We proceed then to consider some of the special safeguarding principles developed in First Amendment cases and other decisions relevant to the freedom of movement.

(1) A Compelling Governmental Interest Must Be Present

One of the special principles is that any abridgement is invalid unless based on a "compelling" governmental interest. No showing merely of a "rational relationship to some colorable state interest" will suffice; only the "gravest abuses, endangering paramount interests," can permit limitation. (E.g., *Sherbert v. Verner*, 374 U.S. 398, 406 (1962).) This principle, commonly applied in First Amendment situations, was not expressly mentioned in *Aptheker* as applicable to the freedom of movement, there being no necessity since the case could be disposed of on

the grounds of overbreadth without considering whether a governmental interest of sufficient strength was involved. However, this principle in reference to freedom of movement is no less appropriate than the other First Amendment principles referred to and applied in *Aptheker* and is, indeed, an integral part of the bundle established by the decisions relied on in *Aptheker,* including *NAACP v. Button,* 371 U.S. 415, 438 (1963).

It merits emphasis that the recent concern accorded to the freedom of movement does not mark a sudden departure from precedent, completely unheralded by prior decisions. It seems fair to say that the freedom of movement, though not always spoken of in those terms, had actually been involved in earlier decisions concerning discrimination between residents and non-residents, citizens and non-citizens, and the like. Most frequently, such decisions were wont to speak of reasonable regulations as permissible, without much precision of statement as to the strength of governmental interest which must be present for justification. This, however, was not invariably true.

More than twenty years ago, the Court was called upon to deal with a discrimination as to which the freedom of movement was not far removed, if not involved, namely, a discrimination among children based on the country of their parents' origin. In striking down the provision, the Court pointed out that there was absent the "compelling justification for discrimination of that nature." *(Oyama v. California,* 332 U.S. 633, 640 (1947).)

About the same time, in *Toomer v. Witsell*, 334 U.S. 385 (1947) the difference in tax levied on resident and non-resident fishermen was invalidated as "practically exclusionary." The freedom of movement may not have been mentioned in so many words, and it is true that some of the language of the opinion indicated the test of permissible regulation to be the one of reasonableness voiced in earlier decisions. However, the reasoning crucial to the result (334 U.S. at pp. 397-398) was that mere promotion of a valid objective could not justify discrimination between residents and non-residents and that such a classification is unlawful unless non-residents constitute a "peculiar" source of the "evil" aimed at. It is submitted that this approach contemplated an objective not only valid but of extraordinary force. It requires little, if any, extension of that approach to conclude that a compelling governmental interest must appear before a classification between residents and non-residents or any impediment to free movement, can be justified. In any event, such is now the law.

(2) Legislation Must Avoid Overbreadth in the Light of All Its Applications

The freedom of movement is further safeguarded by the standards of judicial review which are common in First Amendment cases and are designed to protect against overbreadth of legislation. A provision, even though addressed to a legitimate purpose, must not operate "unnecessarily broadly" and will be declared fatally defective if its objective could have been achieved "more narrowly" and by "less drastic

means." In legislation affecting this basic right, "precision must be the touchstone." These were the declarations in *Aptheker* (378 U.S. at pp. 508, 512-514) where the applicability of an important corollary was also made clear, namely, that factual application other than the one at bar will be considered in assessing the validity of a provision. (378 U.S. at p. 517.)

It should be noted in passing that close scrutiny for overbreadth has been accorded to legislation affecting important rights other than those in the First Amendment and the freedom of movement. *(Carrington v. Rash,* 380 U.S. 89, 95 et seq. (1964).)

(3) The Burden Is the Government's

Also worthy of note is the principle that the governmental entity, not the individual challenging the legislation, has the burden with respect to whether an interest of sufficient force is served with sufficient precision. The individual is not required to prove that a less drastic statute could not be constitutionally written; it is incumbent upon the government to demonstrate that no alternative form of regulation could accomplish the purpose without infringing constitutional rights. *(Aptheker v. Secretary of State,* 378 U.S. 500, 517 (1963); *Sherbert v. Verner,* 374 U.S. 398, 407 (1962).)

It follows that, in the area of free movement, the presumptions of constitutionality often invoked in support of legislation are not available.

B. Durational Residence Requirements in Welfare Legislation Serve No Permissible Compelling or Rational Governmental Interest and Are, in All Events, Too Drastic and Too Broad

As discussed previously, every durational residence requirement in welfare legislation is discriminatory on its face in a manner relating to movement and resulting in sweeping inequality of treatment with respect to a matter of vital concern. If it could be assumed that any such discriminatory requirement is purposeless, it would obviously be invalid. We think that, typically, the requirements have an underlying objective, and one plain to see: the exclusion of the poor who are, or are likely to be, in need of assistance supported by public funds. Even if restraint fails to prevent entry in the first instance, the withholding of assistance for the period prescribed may operate to encourage potential recipients to return whence they came and will, at the very least, defer additional expenditure until the end of that period.

The restraint and penalty upon free movement by the poor thus aimed at are impermissible, as is clear not only from the recent decisions dealing with freedom of movement but also under the cases concerning the condition of poverty. Contrary to the basic purpose of welfare legislation, persons in need are threatened with loss of, or actually denied, the means to subsist, and without the compelling governmental justification which must be present. Not even a colorably rational relation to a legitimate governmental interest is discernible. Insofar as non-exclusionary justifications have been advanced, we submit they are unconvincing afterthoughts apologetically urged in

substitution for the real and manifestly improper objective. Even if there were some doubt as to whether any of the asserted objectives has a sufficient and permissible relationship to durational residence requirements, they must fail because narrower and less drastic measures can serve as well.

(1) Discrimination Without a Purpose

To begin with, a brief word should be said about the possibility that durational residence requirements in some states may be nothing more than the original product, perpetuated through inertia, of either aimless parroting of law elsewhere or, at most, the provincial inclination to draw distinctions generally between established inhabitants and "outsiders." It is not amiss to recall in this connection the familiar fact that the pressures incident to frontier infancy led not infrequently to the hasty and massive copying of laws existing in other jurisdictions. Nor can we ignore that even in this modern day, as we understand the situation, Pennsylvania was unable to define the purpose of its durational residence requirement at the trial of the case now pending before the Court.[3]

As we have seen, classifications having an exclusionary effect must be aimed at some peculiar evil represented by the excluded persons, and a compelling governmental objective must be shown to underlie with precision any abridgement of the freedom of movement. Patently, to the extent that any durational

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[3]We have not had an opportunity to examine the record in the Pennsylvania case. In this respect and others to be mentioned later, we have relied on the lower court's opinion there.

residence requirement exists in welfare legislation as the result of the haphazard lawmaking here under discussion, whether in Pennsylvania or elsewhere, it must fall.

(2) The Exclusion of the Poor to Protect the Treasury

We are satisfied, as already indicated, that, typically, durational residence requirements in welfare legislation have a definite purpose, the exclusion of poor persons who are, or are likely to become, in need of assistance from public funds. This we think is evident, in the first instance, from the all-inclusiveness of the requirements themselves. Even if not invariably so, the prospect of attributing to lawmakers a mindlessness at odds with their trust must render rare, at most, the occasions justifying departure from the injunction of Justice Hughes that the purpose of an enactment "must be found in its natural operation and effect." (*Truax v. Raich,* 239 U.S. 33, 40 (1915).)

The intent of this legislation is also readily discernible from its history and from its frequent company with other provisions having the same exclusionary purpose, such as the kind condemned in *Edwards v. California,* 314 U.S. 160 (1941), and the so-called removal statutes. Durational residence requirements, like the related laws, find their distant ancestry in the settlement concepts concerning the responsibility to care for the needy and in negative attitudes toward the destitute. (See, e.g., tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status,* 16 Stan.L.Rev. 257, 259-265 (1964);

Jordan, *Philanthropy in England 1480-1600,* at pp. 78-83 (1959); Harvith, *The Constitutionality of Residence Tests for General and Categorical Assistance Programs,* 54 Cal.L.Rev. 567 (1966).)

Certainly, students of the subject, such as those just cited, have experienced no difficulty in recognizing the exclusionary aims underlying the durational requirements. And, in fact, appellants themselves admit in their brief that the requirement in the District of Columbia has an exclusionary purpose, although they would have us believe that the persons sought to be excluded are limited to those in nearby jurisdictions where lower amounts of assistance are provided.

Whatever the legitimacy of such objectives in the bygone days of Elizabethan England and incipient America, when it was deemed fitting that one in need look for help to his birthplace and be classed with the criminal, the diseased, and the immoral (not without judicial toleration), their legislative perpetuation is no longer permissible. These are different times rendering such attitudes anachronistic and necessitating under the Constitution different response to poverty and its incidents. This is the cardinal teaching of *Edwards v. California,* 314 U.S. 160 (1941), joined in by the majority and the concurring justices alike. The problems and financial burdens of states in dealing with poverty and movement by the poor were acknowledged but could not justify the defective provision because there is no "more certain" prohibition against state legislation than the one against an

attempt by a state "to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." (314 U.S. at p. 173.) Although the obligation to provide relief to the needy was not involved or decided, the Court took pains to point out that the theory of the Elizabethan Poor Laws "no longer fits the facts"; that, particularly in the preceding decade, the task of providing relief to the needy had in not inconsiderable measure become the "common responsibility and common concern of the whole nation"; and that the poor could not be regarded as a "moral pestilence" giving rise to an exception to the limitation on a state's power to restrain movement. (314 U.S. at 174-177.)

Decisions subsequent to *Edwards* have kept faith with its teaching and may even be said to have extended it. The poor are not only to be free from restrictions aimed at preventing their exercise of basic rights but may demand the affirmative assistance of government to place them on a footing of equality which, without assistance, their lack of means would deny them. Thus the destitute accused of crime are entitled to have trial counsel appointed to defend them. (*Gideon v. Wainwright,* 372 U.S. 335, 339 et seq. (1962).) But solicitude for the poor has not been confined to the exercise of basic rights such as the freedom of movement and the right to counsel. Accordingly, although a state is not required to provide for appellate review in criminal cases, it must, if it does so, expend whatever funds may be necessary to

assure that those too poor to avail themselves of the remedy without help have substantially as full an appeal as the rich can afford, including counsel and trial transcripts. (*Douglas v. California*, 372 U.S. 353, 355 et seq. (1962); *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1955).)

Accordingly, neither poverty as such nor the drain on public money it may entail can justify impeding entry by the poor or denying them equal treatment after arrival. If, as we think, durational residence requirements in welfare legislation have such an aim, their purpose is impermissible. It merits emphasis that the impropriety of such objectives in the case of welfare legislation is particularly apparent because of the extent to which the financial burden is borne federally, rather than by subordinate jurisdictions. Ninety per cent of all welfare payments are of the type supported by federal funds, and, on the average, federal money constitutes more than one-half of the various categories of payments supported. (See *Report of the National Advisory Commission on Civil Disorders* (Bantam Books ed. 1968) p. 457; Dept. of Health, Education, and Welfare, Social and Rehabilitation Service, *Advance Release of Statistics on Public Assistance*, Table 1 (Nov. 1967).)

(3) Exclusion of Poor Persons Seeking More Generous Amounts of Aid

A variant of the purpose just discussed is the asserted explanation that durational residence requirements in welfare legislation are designed to discourage entry by persons in quest of higher amounts of as-

sistance than they receive elsewhere.[4] This is one of the objectives advanced by appellants as to the District of Columbia. There are several reasons for rejecting such an asserted justification.

To start with, all reasonable indications are opposed to the assertion that the exclusionary objective is in fact so limited. The breadth and origins of the legislation confirm that a broader ban was intended, and a pretense of a limited objective confronts at once the embarrassing fact that such requirements prevail in the vast majority of jurisdictions in the country, not all of which can be heard to claim more generous assistance programs than the rest. The District of Columbia does not rank in the top ten jurisdictions with respect to the amount of any of the various categories of aid supported by matching funds. (See Dept. of Health, Education, and Welfare, Social and Rehabilitation Service, *Advance Release of Statistics on Public Assistance,* Tables 3, 4, 5, 6, and 7 (Nov. 1967).) Even if it be supposed that, in a given instance, special materials bearing on legislative intent could permit disclaimer of what statutory language and general history show, appellants have come forth with none. And, perhaps, the most telltale proof of all is eating the pudding served up by the present record. We see here no selective application of the

[4] In view of evidence introduced in the Connecticut and Pennsylvania cases (which we have not personally examined but which are referred to in the respective lower court opinions), we are compelled to observe in passing that there is serious doubt that any significant number of persons change their place of residence in order to receive welfare payments, let alone more generous payments.

requirement in keeping with the limited objective asserted. Among the appellees denied assistance is one (Harrell) who sought family aid after coming from New York, where the amount of such aid is higher than anywhere in the nation (see *Report of the National Advisory Commission on Civil Disorders* (Bantam Books ed. 1968) p. 458), and one (Barley) who has lived in the District for years in a mental institution.

More important, the impermissibility of a limited objective even if cognizable, is established by what has already been considered in regard to the aim of excluding the poor generally. Entry by the poor in consideration of welfare payments rather than for some other motive may be thought to increase the likelihood of financial burden from their movement, but the wish to protect public funds does not permit exclusion of the needy or denying them equal treatment after they arrive. One suspects that a motive so in conflict with *Edwards* and the subsequent decisions dealing with poor persons is advanced in the hope of enticing sympathy for the notion that there is something reprehensible in choices of residence influenced by the amount of public assistance available there. Such a notion is little, if any, removed from those outmoded attitudes discredited in *Edwards*. Blame for seeking the most effective help against the incidents of poverty is on a par with hostility toward the state of being poor. Relief from the ravages of poverty is no more immoral than poverty itself. One who is in need and decides to make his home else-

where because of the availability of more assistance is no fitter object for aversion or exclusion than one who, rich or poor, is influenced to move by the higher calibre of schools for his children, the greater reliability of the police, or, for that matter, the character of any publicly financed service or facility.

We add briefly that, even if exclusion of the limited kind in question had been the true objective and could be defended as legitimate, the durational requirements in the District of Columbia and throughout the country lack the precision necessary to effectuate such a purpose. By reason of their all-inclusive sweep, the restraints operate without regard to whether potential recipients are presently in jurisdictions with higher or lower amounts of aid, and the penalty upon newcomers is as great irrespective of the kind of jurisdiction from which they came or whether they even gave a thought to the availability and amount of assistance in their new home. Obviously, much narrower and less drastic means would be at hand to achieve the asserted aim. The removal of the possible attraction of higher amounts of assistance could, for example, with far less harsh results than an all-inclusive durational residence requirement, be accomplished by simply limiting newcomers from jurisdictions with lower amounts to the same payment as there received.

(4) Exclusion of Those Who Will Not Work

Another and equally vulnerable variant of the purpose to exclude the poor and protect the treasury is

presented by the assertion that the objective of durational residence requirements is the more limited one of excluding persons unwilling to work. The incredibility of such a limited objective in enacting the typical durational requirement, the impermissibility of the objective if cognizable, and the failure, in any event, to legislate with sufficient precision all follow from reasoning parallel to that applicable to the asserted justification of excluding seekers of more generous benefits.

(5) Avoidance of Reducing Assistance to Established Inhabitants

A suggestion made by some, including appellants, is that durational residence requirements are aimed at avoiding the reduction in benefits for established inhabitants which might be expected to flow from the entry of additional recipients. This presents the same issue, in narrower view, as the exclusion of the poor to protect the public treasury. Whether the precise object sought to be achieved by the impermissible exclusion and unequal treatment of outsiders and newcomers is to preserve assistance at current levels, to free public money for other programs, or merely to keep from raising more funds, the impropriety does not alter. The truth, moreover, is that there is no convincing relationship between numbers of recipients and amounts of aid. New York pays among the highest amounts. (See Dept. of Health, Education, and Welfare, Social and Rehabilitation Service, *Advance Release of Statistics on Public Assistance,* Tables 3, 4, 5, 6, and 7 (Nov. 1967).) Let it be forthrightly recognized that, insofar, if at all, as reduction of

current levels of assistance would follow on the heels of the elimination of durational requirements, the reduction will be due not to more recipients but to a legislative refusal to appropriate sufficient funds to meet the needs of all the citizens of the jurisdiction.

(6) Prevention of Fraud

One justification which some, happily not appellants, have dared to advance is that the legislation is addressed to the prevention of fraud, presumably in the form of unwarranted applications for assistance by those not eligible for it independent of the durational requirement itself. It is unconscionable to suppose that newcomers are more inclined to the commission of fraud than established inhabitants with whom they are otherwise identically situated, and it is not easy to see how, in any event, durational residence requirements serve fraud prevention in any manner not as readily derived from checking procedures applicable to established inhabitants. Protection against abuse may be a worthy objective, but no more so as to newcomers than as to others, and the durational requirements simply have no compelling or rational relationship to that objective.

(7) Facilitating Administration and Budgeting

Nor do appellants join those who, eschewing the true exclusionary purpose of the legislation, would defend it in vague and unpersuasive terms relating to the administrative and budgetary goals facilitated. The unrealistic core of this line of argument seems

to be that desirable predictability of caseload is in some mysterious fashion promoted. One would expect that prediction in these matters is at best a hazardous enterprise, so affected as they must be by the intricate interplay of often fortuitous events which shape the vagaries of our economy. Our imagination falters at why the process is made more feasible by requiring that the person ultimately asking for assistance live in the jurisdiction for a certain period of time before applying. Why is the sudden plight of a resident of twenty years the easier to foretell by reason of the length and constancy of his place of abode than the need of a newcomer who comes to fill a job but loses it after a few months and requires help?

Understandably, the extent of the current year's caseload may be a factor enabling some projection of the demand in the ensuing year, but neither the existence of that factor nor consideration of it will be foreclosed or affected by elimination of the durational requirements. To the extent that projections, of necessity imperfect, must now be relied upon, together with special budgetary approaches and adjustments to cope with miscalculation, their abandonment is in no way the concomitant of eliminating durational requirements.

We submit that there is no compelling or rational relationship between preservation of durational residence requirements and sound administrative and fiscal practice. We believe, instead, the actualities are that disappearance of the durational requirements, rather than complicating the mechanics of assistance

programs, will usher in a more efficient and economical implementation.[5]

In the event that the Court is more successful than we in discerning some conceivable administrative advantage in retention of the durational requirements, we should add that important rights are not to be casually abridged "because of some remote administrative benefit to the State." (*Carrington v. Rash,* 380 U.S. 89, 96 (1964).)

(8) Testing Good Faith Residence

There is yet another apology offered for the durational residence requirements in welfare legislation, namely, that they are legitimately designed as a test to assure that recipients of assistance have in fact become bona fide residents of the jurisdiction. As in the case of the two assertions of non-exclusionary aims just discussed, we submit it as clear that this one is a desperate attempt to hide the true and impermissible purpose involved. In joining the ranks of those who rely on it, while also urging the desire to exclude persons seeking more generous welfare payments, appellants would seem to have two warring tigers by the tail. There is hardly a danger that persons moving to the District of Columbia for more aid would not intend and want to become residents there. Nor, again, is the existence of such a limited purpose consistent with the application of the durational requirement to appellee Barley.

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[5]From the lower court's opinion in the Pennsylvania case now pending before this Court, we understand that uncontroverted evidence to this effect was introduced there.

The most vulnerable aspects of the asserted justification, however, lie in another direction. There is no compelling or even rational relationship between the means and the end. One may stay in a place for a year without intending it to be his permanent home, and, on the other hand, it must be conceded that many intend to become and remain residents from the moment of entry or even before. Viewed as tests for measuring good faith residence, durational residence requirements improperly operate as a conclusive presumption, irrebuttable by the clearest proofs. (Cf. *Carrington v. Rash,* 380 U.S. 89, 96 et seq. (1964); *Aptheker v. Secretary of State,* 378 U.S. 500, 510 (1963).) Here, as in *Carrington,* one can be sure that states apply less drastic means of testing intentions in a variety of situations and would have no difficulty in quickly accepting newcomers as residents when advantageous, as, for example, in order to subject them to income tax provisions.

C. The Durational Residence Requirements Abridge the Freedom of Movement

It follows from what has been said above that durational residence requirements in welfare legislation are violative of the freedom of movement guaranteed by the Constitution. The true, exclusionary purpose is clear, and, in any event, the effect whether or not intended, is to restrain poor persons from exercising their right to move and to penalize poor persons who have recently exercised it. Finding impetus in *Edwards* and consummation in the recent cases such as *Aptheker,* the freedom of movement has at last

been elevated to its rightful perch of a preferred and specially safeguarded right. Under *Edwards* and the later cases dealing with poverty, neither that condition nor the financial burdens a state may experience as a result of it can justify the restraint exerted upon movement by the poor or the penalty imposed upon poor persons who have recently moved. The non-exclusionary objectives unconvincingly asserted in attempted justification, even if cognizable, lack the compelling quality which must be present to permit the abridgement. The durational residence requirements do not even have a rational relationship with such objectives, and, if they did, they would fail for overbreadth.

D. The Durational Residence Requirements Violate the Equal Protection and Due Process Clauses

It should be pointed out that the foregoing establishes that durational residence requirements in welfare legislation result in the invidious kind of discrimination prohibited by the Equal Protection and Due Process Clauses of the Constitution. In a case like the present one, where movement or the possibility of movement is the trait giving rise to the discrimination, it is difficult to conceive how the operation of these clauses can be separated from the freedom of movement. They are among the several provisions which may be thought to safeguard that freedom, and the Due Process Clause of the Fifth Amendment was the specific basis of the holding in *Aptheker*. The realistic approach would seem to require recognition of the existence and importance

of the freedom of movement and condemnation on the basis of the violation of that freedom as such. However, a few comments should be made as to the possibility of applying the clauses independent of the freedom of movement.

The basic purpose of welfare legislation is to assist those citizens of a jurisdiction who are in need. Yet there is an all-inclusive denial of help to newcomers accompanied by an all-inclusive preferment of established inhabitants, notwithstanding the fact that the Fourteenth Amendment declares that any citizen of the United States is a citizen of the state where he resides. The sole differentiating trait is newness of arrival, and that feature, as noted earlier, has no rational or sufficiently precise relationship to any permissible governmental objective. It may have a relationship to the avoidance or deferring of expenditures from public funds, but, under *Edwards* and the later cases concerning poverty, such as *Griffin v. Illinois*, 351 U.S. 12 (1955), that concern cannot justify unequal treatment as to a vital matter.

Thus, we believe that the Equal Protection and Due Process Clauses may be applied to condemn durational residence requirements in welfare legislation independently of the freedom of movement, although we persist in the view that the most forthright approach is invalidation on the ground of the unwarranted abridgement of that freedom.

IV. ARGUMENTS COMMONLY MADE IN SUPPORT OF THE LEGISLATION ARE WITHOUT MERIT

There remain to be considered various arguments commonly made in defense of durational residence requirements in welfare legislation. Essentially, the answers to all such arguments flow from the controlling decisions we have cited, but specific response, however brief, should be added as to some of them.

A. The Fiscal Argument

There are sometimes suggestions that governmental determinations involving the expenditure of funds raised by taxation are, somehow, especially insulated against judicial review. There is no such rule. Courts, of course, will not interfere with determinations of a fiscal character, or any determinations for that matter, if they do not affect constitutional rights or do so but are justified by considerations of sufficient strength. On the other hand, courts have not hesitated to strike down unconstitutional conditions even though, by the negative process of elimination, the result would be a different use of public funds or property from that originally intended. (*Cramp v. Board of Public Instruction, Orange County, Fla.*, 368 U.S. 278, 288 (1961); *Wieman v. Updegraff*, 344 U.S. 183, 191-192 (1952); see also authorities cited in *Sherbert v. Verner*, 374 U.S. 398, 404-405, fn. 6 (1962).) And, as already stressed, affirmative assistance by government has been required where necessary to avoid inequality as to an important matter. (E.g., *Griffin v. Illinois*, 351 U.S. 12 (1955).)

B. The Privilege Argument

The authorities just cited and many others also serve to dispose of another argument sometimes heard in this field, namely, that there is no basis for constitutional complaint against durational residence requirements because receipt of assistance is in the nature of a privilege which could have been withheld altogether in the first instance. (See, in addition to the above, a leading case on the subject of unconstitutional conditions, *Frost Trucking Co. v. R.R. Com.*, 271 U.S. 583, 592-594 (1926).).

C. The Indirectness Argument

The same authorities, including *Sherbert* and *Frost Trucking Co.*, reject the assertion that the durational requirements cannot be viewed as abridging the freedom of movement because their impact is indirect rather than a direct blockage of movement. As the cases make clear, what is important is the severity of the impact, not its characterization as indirect or direct.

D. The Non-Contractual Benefits Argument and Flemming v. Nestor, 363 U.S. 603 (1959)

Perhaps the argument most strongly pressed by appellants is that, since non-contractual benefits of welfare legislation are involved, extremely lenient standards of review are applicable. The kinship to the privilege argument is unmistakable. What appellants ignore is the crucial point that the standards a measure must meet depend not on whether it can be said to involve a benefit, privilege, or gratuity but

whether it injects in that connection a provision abridging a fundamental right. If, as we have seen, a statute curtails a First Amendment right or the freedom of movement, the government must show that a compelling interest underlies the provision.

Appellants rely on broad language in *Flemming*. That case, however, according to the majority, did not involve any fundamental rights such as the freedom of movement. Moreover, as was later pointed out in *Sherbert v. Verner*, 374 U.S. 398, 409, fn. 9 (1962), the ground of decision in *Flemming* was that Congress had a "compelling interest" in denying the benefits.

E. The Subsidy Argument

Brief mention should be made, too, of the rather absurd assertion that elimination of durational requirements, rather than removing obstruction to movement by the poor, will result in subsidizing movement by them. A comparable argument was made and rejected in *Sherbert* with respect to the establishment of religion. (374 U.S. at p. 409.)

F. Other Assertedly Similar Restraints

It is also claimed that there are various kinds of legislation having at least as great a restraining effect upon movement. Reference is made, for example, to the existence of higher taxes or stricter license requirements in one jurisdiction than in another. It is forgotten that matters of that sort differ in the vital respect that there is no discrimination in favor of established inhabitants and against outsiders and newcomers.

G. The Asserted Revolutionary Character and Disruptive Consequences of Invalidation in the Light of Other Durational Residence Requirements

Much has been heard in this and the related cases to the effect that invalidation of durational residence requirements in welfare legislation will have far-reaching and disastrous consequences. Allusion is made to residence requirements of various sorts throughout the country. One is almost led to fear that the bedrock of the nation's law is threatened with undoing.

The truth, of course, is that there is nothing revolutionary in the judicial condemnation of durational residence requirements and analogous provisions. A number of lower courts have not hesitated to act, when deemed appropriate, and with respect, in some instances, to provisions which might be thought, unlike the ones in question here, to have a chance of refuge in the apologetics of the police power. (See, e.g., *City of New Brunswick v. Zimmerman,* 79 F.2d 429 (1935) (N.J.); *Mercer v. Hemmings,* 194 So.2d 579 (1966) (Fla.); *McCreary v. State,* 165 So. 657 (1936) (Fla.); *Dusenbury v. Chesney,* 121 So. 567 (1929) (Fla.); *Newman v. Graham,* 349 P.2d 716 (1960) (Idaho); *Lipkin v. Duffy,* 196 A. 288 (N.J.); *State ex rel. McCulloch v. Ashby,* 387 P.2d 588 (1963) (N.Mex.); *People v. Gerald Bowen,* 175 N.Y.S.2d 125 (1958); *Schrager v. City of Albany,* 99 N.Y.S.2d 697; *Wormsen v. Moss,* 20 N.Y.S.2d 798.)

It is also true that there is, or at least was, a wide-ranging pattern of durational residence requirements. As to some, a rather strong or possible case of com-

pelling justification may be made. Such requirements, for example, find clear force in the area of voting, where there is understandable concern that the integrity of the election process might be undermined by the entry of masses of voters solely to cast ballots and by the unfamiliarity of newcomers with local issues, conditions, and candidates. (*Drueding v. Devlin,* 234 F.S. 721, 724 (1964) (Md.) (aff'd per curiam 380 U.S. 125 (1965)).) By analogy to the voting situation, a defense would appear to be available as to durational requirements for the holding of public office or even, perhaps, the holding of a quasi-public position such as a corporate director. And some requirements might be thought less vulnerable because they involve occupations or professions of somewhat higher than average potential for harm to the public, such as the selling of alcoholic beverages. (See *Hinebaugh v. James, Tax Comm'r,* 192 S.E. 177 (1937) (W.Va.).)

The only decision squarely in point we know of prior to the recent group, *People ex rel. Heydenreich v. Lyons,* 30 N.E.2d 46 (1940) (Ill.), is contrary to our position, but we experience no alarm on that account. It was decided without consideration of the doctrine of unconstitutional conditions and without benefit of the decision the following year in *Edwards v. California,* 314 U.S. 160 (1941). The reasoning in question, which was not the holding but dictum, ranged from the privilege argument to the justifiability of excluding the poor to protect the treasury. An approach less worthy of weight in this field is hard to imagine.

We do not pretend that some durational residence requirements may not be adversely affected by invalidation here, but, on the other hand, many will not lack grounds for distinction. We will not conjecture. What is, in any event, clear is that durational residence requirements in welfare legislation abridge a basic freedom and without serving any permissible objective which is compelling or even rational. That, for the present, is quite enough.

CONCLUSION

There is no dearth of indications that perhaps no time in our history has rivaled the present for urgency to take all feasible steps to relieve the misery of the poor. The elimination of durational residence requirements in welfare legislation would be a milestone in that direction, and fortunately, it is as legally required as socially wise. The majority of judges in several lower courts have begun the laudable work. It is now for this Court to complete it.

We pray that the judgments in this and the related cases be affirmed.

Dated, April 12, 1968.

Respectfully submitted,

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